

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

MARK WAYNE CLARK,	)	CASE NO. C04-1647-JCC
	)	
Plaintiff,	)	
	)	REPORT AND RECOMMENDATION
v.	)	ON DEFENDANTS' MOTION FOR
	)	SUMMARY JUDGMENT
DEAN MASON, et al.,	)	
	)	
Defendants.	)	
_____	)	

Plaintiff is an inmate in the custody of the Washington Department of Corrections ("DOC"). Proceeding *pro se* and *in forma pauperis*, plaintiff has filed a civil rights action pursuant to 42 U.S.C. § 1983. Defendants have filed a motion for summary judgment. (Dkt. #208). Plaintiff has filed a response to the motion and defendants have filed a reply. (Dkt. ##252, 256). Having considered the papers and pleadings submitted by the parties, it is recommended that defendants' motion be construed as a motion for partial summary judgment, and so construed, the motion be GRANTED.

**I. Background**

The procedural history of this case is lengthy and was summarized by the Court in a previous Report and Recommendation ("R&R"), issued on March 31, 2005, which addressed defendants' motion to dismiss. (Dkt. #90). That history will not be repeated here. Nor will the

01 Court attempt to summarize the facts underlying this lawsuit, except in the context of each claim,  
02 as discussed below. In essence, plaintiff alleges that DOC officials and employees have engaged  
03 in a campaign of retaliation against him due to his prior success in several lawsuits against prison  
04 officials.

05 In the previous R&R, the Court outlined four broad causes of action that plaintiff raised  
06 in his original complaint, filed on July 19, 2004<sup>1</sup>:

- 07 (1) Denial of plaintiff's right to freedom of expression in violation of the First and  
08 Fourteenth Amendments (Dkt. #6, ¶ 118);  
09 (2) Retaliatory actions in violation of the First and Fourteenth Amendments ( *Id.*, ¶  
10 119);  
11 (3) Denial of due process in violation of the Fourteenth Amendment (*Id.*, ¶ 120); and  
12 (4) Denial of plaintiff's property and liberty interests (*Id.*, ¶ 121).

13 After examining the claims and numerous exhibits submitted by the parties, the Court  
14 recommended that certain claims be dismissed and other claims be limited in scope. Specifically,  
15 the Court recommended that all claims be dismissed that (1) accrued before July 19, 2001; (2)  
16 challenged the constitutionality of the DOC rule (Policy Directive 450.100) prohibiting sexually  
17 explicit material; or (3) involved a host of issues (the denial of visitation rights, parole, transfer to  
18 another prison, loss of property, or imposition of disciplinary sanctions), unless such claims were  
19 part of plaintiff's general retaliation claim. (Dkt. #90 at 16-20). The District Court adopted these  
20 recommendations in an Order issued on May 19, 2005. (Dkt. #96).

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22 <sup>1</sup> For the sake of simplicity, when the Court analyzes these four broad claims below, they  
will be discussed in a slightly different order.

01 Plaintiff filed a supplemental complaint, alleging additional retaliatory acts and adding new  
02 defendants, on August 4, 2005. (Dkt. #112). After a lengthy period of discovery, defendants filed  
03 the instant motion for summary judgment on December 13, 2006. (Dkt. #208). After receiving  
04 several extensions of time, plaintiff filed his response on April 10, 2007. (Dkt. #252). Defendants  
05 received an extension of time as well and filed their reply on April 25, 2007. (Dkt. #256). The  
06 matter is now ready for review.

## 07 II. Analysis

08 Summary judgment is proper only where “the pleadings, depositions, answers to  
09 interrogatories, and admissions on file, together with the affidavits, if any, show that there is no  
10 genuine issue as to any material fact and that the moving party is entitled to judgment as a matter  
11 of law.” Fed. R. Civ. P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). The  
12 court must draw all reasonable inferences in favor of the non-moving party. *See F.D.I.C. v.*  
13 *O’Melveny & Meyers*, 969 F.2d 744, 747 (9th Cir. 1992), *rev’d on other grounds*, 512 U.S. 79  
14 (1994).

15 The moving party has the burden of demonstrating the absence of a genuine issue of  
16 material fact for trial. *See Anderson*, 477 U.S. at 257. “When the moving party has carried its  
17 burden under Rule 56(c), its opponent must do more than simply show that there is some  
18 metaphysical doubt as to the material facts. . . .Where the record taken as a whole could not lead  
19 a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial.” *Scott*  
20 *v. Harris*, \_\_\_U.S.\_\_\_, 127 S. Ct. 1769, 1776 (2007) (internal citation and quotation omitted).  
21 Conclusory allegations in legal memoranda are not evidence, and cannot by themselves create a  
22 genuine issue of material fact where none would otherwise exist. *See Project Release v. Prevost*,

722 F.2d 960, 969 (2nd Cir. 1983).

In order to sustain a cause of action under 42 U.S.C. §1983, plaintiff must show (i) that he suffered a violation of rights protected by the Constitution or created by federal statute, and (ii) that the violation was proximately caused by a person acting under color of state law. *See Crumpton v. Gates*, 947 F.2d 1418, 1420 (9th Cir. 1991). To satisfy the second prong, plaintiff must allege facts showing how individually named defendants caused or personally participated in causing the harm alleged in the Complaint. *See Arnold v. IBM*, 637 F.2d 1350, 1355 (9th Cir. 1981).

#### A. Independent Claims

As previously indicated, the bulk of plaintiff's claims are based on his theory that defendants have engaged in a campaign of retaliation against him. In addition, however, plaintiff attempts to raise several non-retaliatory claims of constitutional violations. The Court previously has limited the scope of these independent claims. (Dkt. #90). Defendants argue in their motion for summary judgment that to the extent that these claims have survived to this stage of the litigation, plaintiff cannot show that they present a genuine issue of material fact, and should therefore be dismissed. The Court addresses each claim in turn.

##### 1. Denial of First Amendment Right to Freedom of Expression

It is undisputed that on many occasions during his incarceration, prison officials have seized artwork or clippings from plaintiff's cell and subjected him to disciplinary proceedings for having sexually explicit material in his cell. Under the relevant prison regulations, plaintiff is prohibited from receiving in the mail or possessing artwork that depicts a minor or someone who appears to be a minor, in a sexually suggestive way. (Dkt. #208, Ex. 3, Attachment QQ). In

01 addition, the regulations were amended in 2004 to also prohibit possession of artwork that depicts  
02 full frontal nudity. (*Id.*, Attachment RR).

03 It is also undisputed that none of the artwork in question is part of the record currently  
04 before the Court.<sup>2</sup> (Dkt. #208 at 15-16). It appears that it has either been lost or destroyed.  
05 Indeed, plaintiff alleges that defendants have destroyed his work in retaliation for his litigation  
06 activities. (Dkt. #6 at ¶ 121(a)).

07 The Court has already ruled that plaintiff may not challenge the constitutionality of the  
08 prison regulation banning the possession of sexually explicit material.<sup>3</sup> (Dkt. #96 at 2). Given that  
09 the regulation's constitutionality is unquestioned, it appears that plaintiff's sole First Amendment  
10 challenge, based upon the confiscation of his artwork, is an "as-applied" challenge to the actions  
11 of defendants who seized his artwork pursuant to the regulations. *See Hargis v. Foster*, 282 F.3d  
12 1154, 1157-58 (9th Cir. 2002) (prisoner may challenge whether his or her speech fits within  
13 regulation in question). However, because the Court is unable to actually review any of the  
14 artwork in question, the Court is unable to determine whether defendants properly applied their  
15 own regulations. *See Pepperling v. Crist*, 678 F.2d 787, 791 (9th Cir. 1982) (a court cannot,

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17 <sup>2</sup> Defendants filed exhibits under seal (Dkt. #208, Ex. 1) that they present as samples of  
18 plaintiff's artwork, but which they admit were not the subject of any of the infractions discussed  
19 herein. (Dkt. #208 at 15). Plaintiff does not dispute defendants' statement that "none of the  
20 original pictures associated with any of these events are available to Defendants. . . ." (*Id.*)

21 <sup>3</sup> Even if plaintiff were to challenge the constitutionality of the regulation, this Court has  
22 already upheld its validity. *See Powell v. Riveland*, 991 F. Supp. 1249, 1254 (W.D. Wash. 1997)  
(upholding constitutionality of DOC Policy 450.100); *see also Mauro v. Arpaio*, 188 F.3d 1054  
(9th Cir. 1999) (en banc) (holding that a similar Arizona regulation prohibiting prisoners from  
possessing sexually explicit material did not violate the Constitution). Indeed, plaintiff himself has  
already challenged this regulation in this Court and his challenge was rejected. *See Clark v.*  
*Lehman*, Case No. C97-761-WD (Dkt. #117, Order adopting Report and Recommendation).

01 without close examination of the material in question, determine whether its prohibition violates  
02 First Amendment). Therefore, plaintiff has failed to satisfy his burden of showing a genuine issue  
03 of fact regarding his First Amendment claim, and defendants' motion for summary judgment  
04 should be granted as to this claim.

05       2.       Denial of Fourteenth Amendment Right to Due Process

06       Plaintiff's original and supplemental complaints both contain claims that his federal due  
07 process rights were violated by numerous actions taken by defendants. (Dkt. #6 at 22-23; Dkt.  
08 #112 at 19). However, the Court limited the scope of plaintiff's due process claims in the  
09 previously issued R&R that addressed defendants' motion to dismiss. (Dkt. #90 at 16-19). In that  
10 R&R, the Court concluded that many of plaintiff's due process claims were not cognizable as  
11 independent claims, separate from his claims of retaliation. The Court observed that plaintiff  
12 himself had conceded this point in stating that his principal claim is that the due process violations  
13 were part of an "on-going campaign of retaliation . . . ." (Dkt. #56 at 26).

14       Nonetheless, defendants argue in their motion for summary judgment that "the Court left  
15 open the possibility of [independent] due process challenges for Mr. Clark's disciplinary hearings"  
16 and his classification reports. (Dkt. #208 at 22-23). Defendants proceed to argue that plaintiff  
17 has failed to state a due process claim with regard to his disciplinary hearings because he did not  
18 suffer any loss of good time credit as a result of these hearings. Because he did not lose any good  
19 time credits, defendants maintain, plaintiff did not suffer an "atypical and significant hardship," as  
20 a result of the disciplinary hearings. Such a showing is a required element of a liberty-based due  
21 process claim. *See Sandin v. Conner*, 515 U.S. 472, 484 (1995). Defendants also contend that  
22 classification decisions by prison officials similarly cannot form the basis of a due process violation

01 because the classification of a prisoner is merely an incident of prison life.

02       It is unclear whether plaintiff considers his due process claims to be independent of his  
03 retaliation claims. Plaintiff did not address defendants' argument in his response to the motion for  
04 summary judgment. Instead, on the last page of his response, plaintiff acknowledges that he ran  
05 out of time and could not include any argument in support of these claims. (Dkt. #252 at 75). His  
06 later attempt to file a supplemental response that addressed the due process argument was ordered  
07 stricken as untimely by the Court. (Dkt. #255). However, the Court notes that at the end of his  
08 response, plaintiff stated that "THE *RETALIATORY ACTIONS OF THE DEFENDANTS*  
09 *DENIED PLAINTIFF OF HIS RIGHT TO DUE PROCESS OF LAW. . . .*" (Dkt. #252 at 75)  
10 (original in capital letters; emphasis added). Thus, it appears that plaintiff considers his due  
11 process claims to be inextricably linked to his claims of retaliation.

12       To the extent that plaintiff may consider his due process claims independent of his  
13 retaliation claims, defendants' argument based upon *Sandin* appears correct. Without any loss of  
14 good time credit, disciplinary hearings do not pose an atypical and significant hardship sufficient  
15 to trigger due process protections. For the same reason, mere classification decisions fail to rise  
16 to the level of a due process claim. *See Myron v. Terhune*, 476 F.3d 716, 718 (9th Cir. 2007)  
17 (prison regulations governing inmate classification did not create cognizable Eighth or Fourteenth  
18 Amendment liberty interests). Accordingly, plaintiff has failed to satisfy his burden of showing a  
19 genuine issue of fact regarding his due process claims, and defendants' motion for summary  
20 judgment should be granted as to this claim.<sup>4</sup>

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22       <sup>4</sup> The Court notes that plaintiff attempts in his supplemental complaint to raise issues under  
the rubric of a due process violation that do not properly belong to that category of claims. (Dkt.

01           3.       Denial of Plaintiff's Property and Liberty Interests under Due Process Clause

02           As stated above, the Court limited the scope of plaintiff's claims related to property or  
 03 liberty interests in the previous R&R. (Dkt. #90 at 16-19). The Court relied upon Ninth Circuit  
 04 precedent, which holds that "a negligent or intentional deprivation of a prisoner's property fails  
 05 to state a claim under section 1983 if the state has an adequate post deprivation remedy." *Barnett*  
 06 *v. Centoni*, 31 F.3d 813, 816 (9th Cir. 1994). Because Washington state has such a remedy for  
 07 loss of property – RCW §§ 4.92.100-110 – the Court recommended that plaintiff's claims related  
 08 to loss of property be limited to his claim that defendants destroyed his property in retaliation for  
 09 his protected activities. (Dkt. #90 at 18).

10           The Court declines to revisit this issue and plaintiff has offered no reason why the Court  
 11 should reconsider its prior conclusion. Accordingly, plaintiff has failed to satisfy his burden of  
 12 showing a genuine issue of fact regarding his due process claim related to loss of property, and  
 13 defendants' motion for summary judgment should be granted as to this claim. In addition, to the  
 14 extent that plaintiff attempts to include harm to any purported "liberty" interest under this claim,  
 15 such claims are subsumed within plaintiff's retaliation claims, discussed below.

16   B. Retaliation Claims

17           As mentioned, the bulk of plaintiff's claims are based upon his principal allegation that  
 18 DOC officials have engaged in an "on-going campaign of retaliation" against him and that "there  
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20 #112 at ¶ 60(a)-(c)). The first of these purported due process claims is against two members of  
 21 the Indeterminate Sentence Review Board – John Austin and Julia Garret – who have been  
 22 dismissed as defendants from this lawsuit. (Dkt. #109). The second is more properly considered  
 an act of retaliation than a due process violation, and the third pertains to plaintiff's alleged loss  
 of property, which is discussed below.

is no separation of the retaliatory acts and the resulting injuries.”<sup>5</sup> (Dkt. #56 at 26). As noted in the previously issued R&R, these retaliatory acts fall into multiple categories. After stating the applicable standard governing retaliation claims, the Court will address each claim in turn.

#### Standard Governing Retaliation Claims

To state a claim based upon retaliation, a prisoner must allege that (1) the type of activity he was engaged in was protected; (2) prison officials impermissibly infringed on his right to engage in the protected activity, *i.e.*, they acted in a retaliatory manner; and (3) prison officials’ retaliatory action served no legitimate penological interest. *See Rizzo v. Dawson*, 778 F.2d 527, 531-32 (9th Cir. 1985). In *Rizzo*, the Ninth Circuit emphasized that for a prisoner to state a cause of action based upon retaliation, he “must do more than allege retaliation. . . he must also allege that the prison authorities’ retaliatory action did not advance legitimate goals of the correctional institution or was not tailored narrowly enough to achieve such goals.” *Id.* at 532. Thus, in order to survive summary judgment, the plaintiff bears the burden of showing that there was no legitimate penological objective to defendants’ actions. *See Pratt v. Rowland*, 65 F.3d 802, 806 (9th Cir. 1995).

In addition, the Ninth Circuit has cautioned that retaliation claims brought by prisoners must be evaluated in light of concerns over “excessive judicial involvement in day-to-day prison

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<sup>5</sup> The distinction between plaintiff’s retaliation claims and his free-standing claims asserting other constitutional violations is often difficult to discern in plaintiff’s pleadings. For example, in his response to defendants’ motion for summary judgment, plaintiff divides his argument into First Amendment claims (Dkt. #252 at 41) and retaliation claims. (*Id.* at 51). However, plaintiff discusses identical infractions under both headings and a close reading of his arguments in each section shows that plaintiff’s theory of retaliation permeates almost all his claims. Therefore, unless otherwise specified, the Court’s analysis of the remainder of plaintiff’s claims presumes them to be based upon a theory of retaliation.

01 management, which ‘often squander[s] judicial resources with little offsetting benefit to anyone.’”  
02 *Pratt*, 65 F.3d at 807 (quoting *Sandin v. Conner*, 515 U.S. 472, 482 (1995)). In particular, courts  
03 should “‘afford appropriate deference and flexibility’ to prison officials in the evaluation of  
04 proffered legitimate penological reasons for conduct alleged to be retaliatory.” *Id.* (quoting  
05 *Sandin*, 515 U.S. at 482). “[F]ederal courts must remember that the duty to protect inmates’  
06 constitutional rights does not confer the power to manage prisons or the capacity to second-guess  
07 prison administrators, for which we are ill-equipped.” *Bruce v. Ylst*, 351 F.3d 1283, 1290 (9th  
08 Cir. 2003).

09       Against this deferential standard, the Court will examine plaintiff’s claims that defendants  
10 retaliated against him in myriad ways.

11       1.     Extended Family Visits

12       On July 2, 2001, two corrections officers searched plaintiff’s cell and found what was later  
13 described by a third officer as “a large collection of pornographic material.” (Dkt. #208, Ex. 3,  
14 Attachment H). In addition, they found a photograph of a young girl and several nude drawings  
15 apparently based upon the photograph. ( *Id.*) The identity of the girl was confirmed to be  
16 plaintiff’s minor daughter, with whom he had been having “extended family visits” (“EFVs”) in  
17 prison, which apparently means unsupervised contact visits. (*Id.*)

18       A hearing officer found that the confiscated material did not violate the prison’s ban on  
19 sexually explicit material and imposed no sanction for the infraction. ( *Id.*, Attachment F).  
20 However, concerned about the safety of plaintiff’s daughter, prison officials suspended plaintiff’s  
21 visits with his daughter and referred the matter to the state Child Protective Services (“CPS”)  
22 agency for further investigation. (*Id.*, Attachment G). On August 21, 2001, a social worker at

01 CPS wrote the prison that she had completed her investigation and “would recommend that  
 02 [plaintiff’s] visitation with the child occur out in the open where it can be observed by prison  
 03 personnel.” (*Id.*, Attachment I). Prison officials subsequently cancelled plaintiff’s EFVs with his  
 04 daughter and encouraged plaintiff “to maintain family ties through other means.” (*Id.*, Attachment  
 05 K).

06 Plaintiff alleges that his EFVs with his daughter were cancelled in retaliation for his  
 07 protected activities, *i.e.*, his artwork and his prior litigation against DOC officials.<sup>6</sup> In particular,  
 08 plaintiff argues that by providing CPS with a copy of the nude drawings of his daughter,  
 09 defendants violated a Washington regulation that strictly limits the use of records pertaining to  
 10 disciplinary charges that have been dismissed.<sup>7</sup> Defendants reply that plaintiff reads the regulation  
 11 too broadly as prohibiting all uses of any document associated with a dismissed charge. (Dkt.  
 12 #208 at 27). They maintain that providing CPS with copies of his drawings was not prohibited  
 13 and was rather a valid measure taken to protect a member of the public (plaintiff’s daughter) from  
 14 an inmate in their custody. Such a goal, defendants assert, is “unquestionably a legitimate  
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16 <sup>6</sup> To the extent that plaintiff contends that the cancellation of his EFVs constitutes a  
 17 separate claim independent of retaliation, the Court precluded such an argument in its Order  
 18 adopting the previous R&R. (Dkt. #96). *See Gerber v. Hickman*, 291 F.3d 617, 621 (9th Cir.  
 2002) (prisoners have no constitutional right while incarcerated to contact visits or conjugal  
 visits).

19 <sup>7</sup> The regulation provides in its entirety as follows:

20 “137-28-330. Finding of not guilty.

21 If the hearing officer determines that the inmate is not guilty of all charged infractions,  
 22 disciplinary sanctions shall not be imposed on the inmate and *all records pertaining to the  
 charge(s) shall not be placed in the inmate's central file but may be retained for  
 statistical, litigation, and recordkeeping purposes.*”

WAC 137-28-330 (emphasis added).

01 penological interest.” (*Id.*)

02       The Court finds that plaintiff has not met his burden of showing that there was no  
03 legitimate penological objective to defendants’ actions. *See Pratt v. Rowland*, 65 F.3d 802, 806  
04 (9th Cir. 1995). The fact that the CPS social worker recommended that plaintiff’s EFVs be  
05 curtailed gives weight to prison officials’ concern about the nude drawings of plaintiff’s daughter.  
06 Plaintiff argues in his reply that defendants can point to no reports of inappropriate behavior  
07 between him and his daughter and that CPS therefore had no grounds to “interfere in the matter.”  
08 (Dkt. #252 at 44, n.15). However, such an absence of wrongdoing on his part does not establish,  
09 nor even suggest, that defendants were acting to punish him when they referred the matter to CPS  
10 for further investigation. Defendants were entitled, based upon plaintiff’s nude drawings of his  
11 daughter, to seek expert advice on whether to adopt measures to prevent wrongdoing. In sum,  
12 plaintiff offers no evidence to show that defendants’ actions regarding his EFVs were retaliatory  
13 in nature. Therefore, plaintiff has failed to satisfy his burden of showing a genuine issue of fact  
14 regarding the termination of his EFVs and defendants’ motion for summary judgment should be  
15 granted as to this claim.

16       2.     Disciplinary Hearings

17       Plaintiff alleges that defendants retaliated against him by repeatedly bringing baseless  
18 disciplinary charges against him. The Court addresses each in turn.

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01 a. May 7, 2002 Infraction<sup>8</sup>

02 On May 7, 2002, corrections officers searched plaintiff's cell and found a drawing they  
 03 described as depicting a nude adult male with "his semi erect long penis draped over the shoulder"  
 04 of a nude female who appeared to be a minor. (Dkt. #208, Ex. 3, Attachment L). The drawing  
 05 is not part of the record before the Court. Plaintiff was accused of violating the prison's  
 06 prohibition against the possession of sexually explicit material. (*Id.*, Attachment QQ). At the  
 07 disciplinary hearing on the infraction, plaintiff testified that the drawing in question was based  
 08 upon a photograph from Penthouse magazine, for which he once had an authorized subscription,  
 09 and that the female was "supposed to be in a state of admiration." (*Id.*, Attachment M). The  
 10 hearing officer found plaintiff guilty of the infraction and recommended that plaintiff lose his "in-  
 11 cell curio permit," which enabled him to create artwork in his cell, for thirty days. (*Id.*)

12 Plaintiff asserts that both the search and the guilty finding were prompted by retaliatory  
 13 motives.<sup>9</sup> (Dkt. #252 at 47-48). First, plaintiff contends that a corrections official named Gerrald  
 14 Proctor became angry when he learned that plaintiff planned to sue Proctor's wife, another  
 15 corrections official named Patricia Proctor, for her role in the termination of plaintiff's EFVs with  
 16 his daughter. (*Id.* at 47). Plaintiff alleges that Gerrald Proctor "initiated" the cell search on May  
 17 7, 2002, that resulted in the confiscation of the drawing. (*Id.*) Second, plaintiff maintains that the

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 19 <sup>8</sup> Defendants mistakenly refer to this infraction as having occurred on May 16, 2002. (Dkt.  
 20 #208 at 28). However, the record reveals that the actual date of the infraction was May 7, 2002.  
 (Dkt. #208, Ex. 3, Attachment L). The hearing on the infraction occurred on May 16, 2002. (*Id.*,  
 Attachment M).

21 <sup>9</sup> Plaintiff mistakenly refers to the hearing date as "4/17/02" (Dkt. #252 at 47, 60);  
 22 however, as mentioned, the record shows that the actual date of the hearing was May 16, 2002.  
 (Dkt. #208, Ex. 3, Attachment M).

01 same drawing had previously been seized on July 2, 2001 and found not to be sexually explicit.  
02 Plaintiff argues that the hearing officer reached a contrary conclusion on May 16, 2002, the second  
03 time the drawing was seized, because of improper influence by defendant Michael Williams. (*Id.*)  
04 Finally, plaintiff asserts that the hearing officer admitted during his deposition that, contrary to his  
05 earlier finding, the officer would *not* consider the female in the drawing to be a minor. (*Id.* at 48).

06 The Court notes as an initial matter that plaintiff's citations to the record are difficult to  
07 find amidst the sheaf of documents filed by plaintiff. First, plaintiff did not file his exhibits in  
08 numerical order.<sup>10</sup> Therefore, the Court must look throughout all the exhibits in order to find one.  
09 For example, the hearing officer's deposition, Exhibit 63, is to be found sandwiched between  
10 Exhibit 55 and Exhibit 73. (Dkt. #252). Second, plaintiff does not cite directly to the appropriate  
11 exhibit or deposition, but rather to paragraphs within his own 82-page declaration. (Dkt. #253).  
12 These paragraphs, in turn, refer to a particular exhibit that contains the applicable deposition.  
13 Thus, to locate a citation, the Court must first find the cited paragraph within plaintiff's  
14 declaration, then locate in that paragraph plaintiff's reference to the appropriate exhibit, then find  
15 the exhibit and locate the cited page within the exhibit. Finally, because the exhibits lack line  
16 numbers, the Court must review the entire single-spaced page of an exhibit to locate the portion  
17 quoted by plaintiff. This time-consuming exercise of verifying plaintiff's citations to the record  
18 tests the limits of the Court's patience and were it not for plaintiff's *pro se* status, the Court would

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20 <sup>10</sup> The fact that plaintiff's exhibits are not in numerical order is apparently the result of a  
21 last-minute dispute between plaintiff and prison staff, which led to the exhibits being prepared and  
22 then filed in two separate groups. (Dkt. #250). However, even assuming that plaintiff was not  
at fault for this dispute, this does not explain why, as discussed below, plaintiff did not adopt other  
measures that would have made his citations easier to find.

01 have stricken his declaration and exhibits as an improper strain on the Court's time and resources.  
02 *See Forsberg v. Pacific Bell Co.*, 840 F.2d 1409, 1418 (9th Cir. 1988) (district court is not  
03 obliged to search through depositions to discern factual support for plaintiff's claims).

04 In any event, having tracked down plaintiff's citations to the record, the Court finds that  
05 they do not support his allegations of retaliatory motive. He offers no evidence to show that  
06 either defendant Proctor or defendant Williams acted as he suggests to initiate the cell search or  
07 influence its outcome. In addition, plaintiff's assertion that the hearing officer has recently  
08 changed his mind regarding whether the female appears to be a child is also unsubstantiated. In  
09 fact, the page of the hearing officer's deposition cited by plaintiff contains a comment by the  
10 officer that reaffirms his prior conclusion that the female appeared to be a minor. (Dkt. #252, Ex.  
11 63 at 8). Thus, plaintiff has failed to satisfy his burden of showing a genuine issue of fact  
12 regarding the infraction of May 7, 2002 and defendants' motion for summary judgment should be  
13 granted as to this claim.

14 b. June 26, 2002 Infraction

15 On June 26, 2002, corrections officers found various items, including "photos and  
16 drawings depicting bondage and torture," in plaintiff's cell. (Dkt. #208, Ex. 3, Attachment P). The  
17 items appeared to violate the prison regulation prohibiting the possession of sexually explicit  
18 material. After a hearing, plaintiff was found guilty of violating the regulation, and his appeal  
19 thereafter was denied. (*Id.*, Attachment Q).

20 Plaintiff concedes in his original complaint that he was in possession of a 200-page book  
21 that had a single page which, unbeknownst to plaintiff, contained an image depicting bondage.  
22 (Dkt. #6 at 12). Plaintiff repeats this concession in his response to defendants' summary judgment

01 motion. (Dkt. #252 at 61). However, plaintiff argues that he should have been found guilty of  
02 a minor, as opposed to a major, infraction due to the mitigating circumstances, and that the failure  
03 to do so, as well as some procedural defects in his hearing, are evidence of retaliation. (*Id.*)

04 Defendants argue, among other things, that “one picture of bondage was sufficient for a  
05 guilty finding.” (Dkt. #208 at 29). Defendants concede that the hearing officer, defendant  
06 Alstedt, appears to have misunderstood the meaning of the term “mitigating.” (*Id.*) However,  
07 defendants maintain that, at worst, this is evidence of negligence on the hearing officer’s part, and  
08 not retaliation. Defendants point out that negligence is not actionable as a constitutional violation.  
09 *See Davidson v. Cannon*, 474 U.S. 344, (1986).

10 The Court finds that plaintiff’s assertion that the hearing officer had retaliatory motives in  
11 finding him guilty of a major, instead of a minor, infraction, is speculative. Moreover, because  
12 plaintiff does not dispute the actual basis for the finding of guilt – that a single image of bondage  
13 was in his possession – plaintiff does not carry his burden of showing that there was no legitimate  
14 penological objective to the hearing officer’s actions. *See Pratt v. Rowland*, 65 F.3d 802, 806 (9th  
15 Cir. 1995). Accordingly, plaintiff has failed to satisfy his burden of showing a genuine issue of fact  
16 regarding the infraction of June 26, 2002 and defendants’ motion for summary judgment should  
17 be granted as to this claim.

18 c. October 16, 2002 Infraction

19 On October 16, 2002, a cell search by corrections officers led to the confiscation of  
20 photographs and drawings belonging to plaintiff that appeared to depict “minor females in various  
21  
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01 stages of undress.”<sup>11</sup> (Dkt. #208, Ex. 3, Attachment R). Plaintiff argued at his hearing that the  
02 material was not sexually suggestive and had previously been confiscated and returned to him.  
03 (*Id.*, Attachment S). The hearing officer found him guilty after concluding that the evidence  
04 depicted “nudity of minor females.” (*Id.*) Plaintiff’s appeal was denied. (*Id.*, Attachment T).

05 Plaintiff argues that the hearing officer’s finding of guilt and the denial of his appeal were  
06 based upon retaliatory motives. (Dkt. #252 at 48). To support his argument, plaintiff cites to a  
07 deposition of the official who denied the appeal in question, defendant Willie Daigle. Plaintiff  
08 asserts that Daigle admits in the deposition that “plaintiff should not have been found guilty for  
09 possessing depiction of nude minors that were not sexually suggestive.” (*Id.*) Plaintiff also argues  
10 that the hearing officer’s finding of guilt was unfounded because the officer stated only that the  
11 evidence depicted nude female minors, but did not state that the minors were depicted in a sexually  
12 suggestive manner. (Dkt. #208, Ex. 3, Attachment S).

13 Plaintiff’s allegations of retaliatory motive are not supported by the record. Contrary to  
14 his assertion that Daigle recanted his view that plaintiff had violated the prison’s prohibition on  
15 sexually explicit material, Daigle’s deposition is consistent with his earlier finding upholding the  
16 infraction. For example, Daigle testified that “[b]ased on the information, we felt that it was  
17 sexually explicit of minors, of minor females.” (Dkt. #252, Ex. 101 at 25). While plaintiff is  
18 correct that the hearing officer did not state that the drawings or photographs were “sexually  
19 explicit,” plaintiff offers no evidence to show that this omission was more than a mere oversight  
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21 <sup>11</sup> Plaintiff asserts that the officers also confiscated drawings and photographs worth almost  
22 \$5,000, which did not violate DOC regulations but were never returned to him. (Dkt. #252 at 49;  
Ex. 117). This assertion will be discussed below in the section addressing plaintiff’s claim for lost  
property.

01 on the officer's part. The Court declines to infer a retaliatory motive from such an omission.  
02 Accordingly, plaintiff has failed to satisfy his burden of showing a genuine issue of fact regarding  
03 the infraction of October 16, 2002 and defendants' motion for summary judgment should be  
04 granted as to this claim.

05 d. November 23, 2002 Infraction

06 On November 23, 2002, corrections officers searched plaintiff's cell and found various  
07 drawings and art supplies. (Dkt. #208, Ex.3, Attachment U). At the time, plaintiff had been  
08 serving a 90-day suspension of his in-cell hobby privileges, a sanction imposed for the infraction  
09 of October 16, 2002. (*Id.*, Attachment S). Thus, plaintiff was charged with failing to comply with  
10 his loss-of-privileges sanction.

11 Plaintiff argues that this infraction violated his First Amendment right of freedom of  
12 expression. As he puts it: "It is the First Amendment that gives the Plaintiff the right to draw and  
13 to possess his artwork, not a DOC curio permit." (Dkt. #252 at 51). Plaintiff further contends  
14 that this argument prevailed in a previous lawsuit, *Clark v. O'Conner*, Case No. C92-479-CI  
15 (E.D. Wash.), in which a jury found that a prison official had violated plaintiff's First Amendment  
16 rights when the official told plaintiff he could not draw while serving a similar loss-of-privileges  
17 sanction. (*Id.*) Finally, plaintiff asserts that defendant Williams conceded in a deposition that  
18 plaintiff should not have been found guilty of this infraction. (*Id.* at 50-51).

19 Defendants respond that the decision in *Clark v. O'Conner* is distinguishable because the  
20 officer's comment to plaintiff in that case was that plaintiff "could not draw at all," whereas here,  
21  
22

01 plaintiff's loss of privileges were limited to 90 days. (Dkt. #208, Ex. 2, Attachment A at 3).<sup>12</sup>

02 Plaintiff's argument is unavailing for several reasons. First, plaintiff does not ascribe any  
03 retaliatory motive to the prison officials' actions in this particular infraction. Essentially, plaintiff  
04 challenges the 90 day loss-of-privileges sanction that was imposed for his October 16, 2002  
05 infraction. It is unclear whether plaintiff exhausted this claim administratively. The exhibits  
06 provided by the parties do not conclusively show that plaintiff challenged this sanction through all  
07 levels of the prison grievance system.

08 However, even assuming that plaintiff exhausted this claim, it lacks merit. In brief, plaintiff  
09 cites no authority for the proposition that his loss of in-cell art privileges for 90 days amounts to  
10 an unreasonable restriction on his First Amendment rights. As plaintiff concedes, a prisoner's  
11 artistic freedom may be curtailed if the restriction furthers the legitimate penal objective of  
12 maintaining security. (Dkt. #252 at 41, *citing Pell v. Procunier*, 417 U.S. 817, 822-23 (1974)).  
13 Here, a 90-day abridgment of plaintiff's First Amendment rights appears reasonably related to such  
14 a legitimate penological interest. *See Turner v. Safley*, 482 U.S. 78, 89 (1987). Accordingly,  
15 plaintiff has failed to satisfy his burden of showing a genuine issue of fact regarding the infraction  
16 of November 23, 2002 and defendants' motion for summary judgment should be granted as to this  
17 claim.<sup>13</sup>

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19  
20 <sup>12</sup> Defendants mistakenly cite "Exhibit 2, Attachment D" to support this statement.

21 <sup>13</sup> Additionally, the Court notes that plaintiff's assertion that defendant Williams found the  
22 sanction here improper is not borne out by the record. Williams' deposition, cited by plaintiff, is  
highly equivocal, as Williams frequently expresses uncertainty in response to plaintiff's questions,  
which often involve hypothetical situations not directly at issue here. (Dkt. #252, Ex. 47 at 28).

01 e. December 11, 2002 Infraction

02 On December 11, 2002, plaintiff's cell was searched by corrections officers accompanied  
03 by a dog trained to detect drugs. (Dkt #208, Ex. 3, Attachment V). The dog found marijuana  
04 hidden inside plaintiff's typewriter. (*Id.*) At his hearing, it appears that plaintiff testified that he  
05 had requested a urinalysis to show that he had not been using drugs. (*Id.*, Attachment W). The  
06 hearing officer found plaintiff guilty.

07 Plaintiff contends that several factors make this infraction suspect. (Dkt. #252 at 64). In  
08 essence, he alleges that defendants planted the marijuana in his cell in order to "get rid of plaintiff  
09 once and for all . . . ." (Dkt. #252 at 65). However, plaintiff does not offer anything other than  
10 his own patchwork of speculative observations to support this assertion. Accordingly, plaintiff  
11 has failed to satisfy his burden of showing a genuine issue of fact regarding the infraction of  
12 December 11, 2002 and defendants' motion for summary judgment should be granted as to this  
13 claim.

14 f. January 27, 2004 Infraction

15 On January 27, 2004, corrections officers searched plaintiff's locker in the prison's hobby  
16 shop and found drawings of nude girls that they believed violated the prison's prohibition against  
17 possession of sexually explicit materials. (Dkt #208, Ex. 3, Attachment X). After a hearing,  
18 however, the charge was dismissed. (*Id.*, Ex. Y). Plaintiff contends that the search was conducted  
19 in retaliation for his prior protected activities. To support his claim, plaintiff asserts that he later  
20 spoke with the hobby shop supervisor, Mr. Servatous, who told him that one of the officers who  
21 conducted the search was "out to get him." (Dkt. #253 at ¶ 211).

22 The Court finds that the record does not support plaintiff's contention that the search was

01 conducted for retaliatory purposes. Plaintiff's assertion regarding the statement by Mr. Servatous  
02 is based upon plaintiff's own recollection and not upon a sworn statement from Mr. Servatous  
03 himself. In addition, plaintiff's declaration indicates that Mr. Servatous made this statement *after*  
04 the charge resulting from the search had been dismissed, and that Mr. Servatous thought that the  
05 dismissal had angered the officer who had conducted the search. Therefore, even if it were given  
06 weight, the statement by Mr. Servatous is not probative of the officer's intent in conducting the  
07 search. Accordingly, plaintiff has failed to satisfy his burden of showing a genuine issue of fact  
08 regarding the infraction of January 27, 2004 and defendants' motion for summary judgment should  
09 be granted as to this claim.

10 g. April 12, 2004 Infraction<sup>14</sup>

11 On April 12, 2004, corrections officers searched plaintiff's cell and found drawings and  
12 photographs of nude minors. (Dkt #208, Ex. 3, Attachment AA). *Id.*) After a hearing, however,  
13 the charge was dismissed. (*Id.*, Ex. BB). Plaintiff contends that the search was conducted at the  
14 behest of defendant David Bustanoby, a supervisor at the prison, who allegedly told plaintiff that  
15 "he was going to try and have him found guilty of possessing child pornography." (Dkt. #252 at  
16 66). To support his claim, plaintiff relies solely upon his own declaration. (*Id.*)

17 The Court finds that the record does not support plaintiff's contention that the search was  
18 conducted for retaliatory purposes. Plaintiff's unsupported assertion regarding defendant  
19 Bustanoby's motives lacks probative value. Accordingly, plaintiff has failed to satisfy his burden  
20

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21 <sup>14</sup> Defendants mistakenly refer to this infraction as having occurred on May 12, 2004.  
22 (Dkt. #208 at 32). However, the record shows that the infraction occurred on April 12, 2004.  
(Dkt. #208, Ex. 3 at Attachment AA).

01 of showing a genuine issue of fact regarding the infraction of April 12, 2004 and defendants'  
02 motion for summary judgment should be granted as to this claim.

03 h. August 5, 2004 Infraction

04 On August 5, 2004, corrections officers searched plaintiff's locker in the hobby shop and  
05 found nude drawings and a statuette of a minor female. (Dkt #208, Ex. 3, Attachment CC).  
06 Plaintiff was infraacted for possession of sexually explicit material. After a hearing, however, the  
07 charge was dismissed. (*Id.*, Ex. EE).

08 Plaintiff alleged in his supplemental complaint that the search was prompted by retaliatory  
09 motives. (Dkt. #112 at ¶ 24). However, the allegations do not provide any details regarding the  
10 officers' purported retaliatory motives. Nor does plaintiff explain why he believes the search was  
11 retaliatory in his response to defendants' motion for summary judgment, as he does not address  
12 this particular claim. Accordingly, plaintiff has failed to satisfy his burden of showing a genuine  
13 issue of fact regarding the infraction of August 5, 2004 and defendants' motion for summary  
14 judgment should be granted as to this claim.

15 i. Plaintiff's Request to View Retaliation Claims as a Whole

16 Finally, plaintiff urges the Court to view all of his retaliation claims as a whole and not as  
17 isolated incidents, because when they "are added up, they constitute a pattern of circumstantial  
18 evidence that . . . clearly points to an ongoing concerted effort to retaliate against him." (Dkt.  
19 #252 at 54). While certain types of circumstantial evidence, such as the timing of events, may be  
20 probative of whether defendants acted with retaliatory intent, *see Soranno's Gasco, Inc. v.*  
21 *Morgan*, 874 F.2d 1310, 1316 (9th Cir. 1989), plaintiff's request to view the incidents as a whole  
22 is tantamount to asking the Court to consider the sheer number of incidents as probative of

01 retaliation. The Court declines to ascribe bad faith to corrections officials on the sole basis of the  
02 volume or frequency of their actions.

03 3. Plaintiff's Retaliation Claim Regarding Loss of Property

04 Ordinarily, "a negligent or intentional deprivation of a prisoner's property fails to state a  
05 claim under section 1983 if the state has an adequate post deprivation remedy." *Barnett v.*  
06 *Centoni*, 31 F.3d 813, 816 (9th Cir. 1994). However, in the previous R&R, the Court stated that  
07 "to the extent that plaintiff is alleging that defendants have confiscated his property *in retaliation*  
08 for engaging in protected activities, such claims would appear to be cognizable in a § 1983  
09 action." (Dkt. #90 at 18, citing *Rhodes v. Robinson*, 380 F.3d 1123, 1128-29 (9th Cir. 2004)  
10 (emphasis added)). Accordingly, the Court recommended that plaintiff be permitted to seek relief  
11 for loss of property to the extent that his property was lost or destroyed in retaliation for engaging  
12 in protected activities.

13 Plaintiff alleges repeatedly that DOC officials destroyed or did not return valuable artwork  
14 belonging to him. In all but a few cases, however, the artwork in question had been determined  
15 to violate the prison's ban on sexually explicit material. Obviously, that artwork could not be  
16 returned to plaintiff. The basis for plaintiff's claim that prohibited artwork should not have been  
17 destroyed is unclear as plaintiff does not cite any prison rule or policy under which the artwork  
18 should have been held by the prison for him until he is released or perhaps mailed out to a third  
19 party. In a few instances, plaintiff alleges that prison officials destroyed artwork that was *not*  
20 found to be sexually explicit. (*See, e.g.*, Dkt. #252 at 49; Ex. 117). Presumably, in these cases  
21 the prison had a duty to return the confiscated property to plaintiff and consequently, these claims  
22

01 appear to potentially have more merit.<sup>15</sup>

02       However, defendants do not address these allegations either in their motion for summary  
03 judgment or in their reply.<sup>16</sup> It is unclear whether this omission is the result of a conscious choice  
04 or whether these claims simply escaped the notice of defendants amidst the plethora of plaintiff's  
05 other claims. In any event, because defendants have not moved for summary judgment on this  
06 particular retaliation claim, the Court makes no recommendation on whether summary judgment  
07 should be granted on the claim. The Court notes that defendants' omission renders their motion  
08 for summary judgment a motion for *partial* summary judgment. The Court further notes that the  
09 District Court, in its discretion, may permit further briefing on this issue in order to attempt to  
10 resolve it without the necessity of a trial.

11       4.     Parole Denials

12       As the Court noted in the previous R&R, plaintiff appears to maintain that defendants  
13 retaliated against him by manufacturing false infractions for the purpose of "sabotaging" his parole  
14 hearings. (Dkt. #90 at 17). This claim hinges on plaintiff showing the infractions to be "false."  
15 However, as discussed above, in each instance, the infractions were prompted by legitimate

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17       <sup>15</sup> Nonetheless, the mere fact that property belonging to plaintiff may have been improperly  
18 destroyed on a few occasions does not alone seem sufficient to warrant an inference that the  
19 property was destroyed in retaliation for plaintiff's protected activities. In *Rhodes*, for example,  
20 the Ninth Circuit cited evidence of prison officials being angry at the prisoner which, in  
conjunction with the destruction of the prisoner's property, raised an inference of retaliation. 380  
F.3d at 1128-29. Here, plaintiff does not offer any such credible corroborating evidence to bolster  
his allegation of retaliation.

21       <sup>16</sup> Defendants make a passing reference to plaintiff's claim of retaliation based upon lost  
22 property in their motion for summary judgment, but do not discuss the claim in any detail. (Dkt.  
#208 at 26).

penological reasons. *See Pratt v. Rowland*, 65 F.3d 802, 806-07 (9th Cir. 1995). Thus, the premise for plaintiff's claim that defendants sabotaged his parole hearings has not been established. Accordingly, plaintiff has failed to satisfy his burden of showing a genuine issue of fact and defendants' motion for summary judgment should be granted as to this claim.

5. Psychological Evaluations

a. Dr. Dahlbeck

In 2002, in preparation for his upcoming parole hearing before the Indeterminate Sentence Review Board ("ISRB"), plaintiff was scheduled for a psychological examination to be performed by Dr. Ronald Dahlbeck. (Dkt. #252, Ex. 85). As part of the examination, Dr. Dahlbeck informed plaintiff that he would consider the artwork that had been the subject of the infraction of July 2, 2001, which had been dismissed. (*Id.*) As discussed above, even though the artwork had been determined to not violate the prison's ban on sexually explicit material, it had led to the cancellation of plaintiff's extended family visits with his daughter.

Once plaintiff was informed by Dr. Dahlbeck that he would be considering the artwork as part of his report, plaintiff decided to cancel the examination. Plaintiff apparently felt that the artwork was shielded from discussion by the same regulation that he felt should have precluded its use by the CPS social worker who had recommended curtailing his family visits. (Dkt. #253, § 114). Plaintiff asserts that because Dr. Dahlbeck was planning to discuss plaintiff's artwork, he was therefore willing "to take part in retaliating against him for his protected conduct." (Dkt. #252 at 59).

Defendants argue that plaintiff has failed to cite any authority that suggests "that Defendant Dahlbeck violated Plaintiff's First Amendment rights by advising Plaintiff that he would consider

01 Plaintiff's drawing in conducting a psychological evaluation of Plaintiff." (Dkt. #256 at 55).  
02 Defendants point out that Dr. Dahlbeck did not provide the ISRB with a psychological report on  
03 plaintiff in 2002, or at any time later, and that plaintiff chose to halt the process.

04 The Court finds that plaintiff's claim against Dr. Dahlbeck hinges upon two assumptions  
05 that are not supported by the record: First, that Dr. Dahlbeck wished to retaliate against plaintiff  
06 for some reason and second, that his report to the ISRB would have discussed the artwork in  
07 question in a manner that harmed plaintiff's chances of getting parole. Further, it appears that Dr.  
08 Dahlbeck's consideration of the artwork was prompted by a legitimate penological goal, *i.e.*, to  
09 present a complete picture of plaintiff's psychological state. For these reasons, plaintiff has failed  
10 to satisfy his burden of showing a genuine issue of fact and defendants' motion for summary  
11 judgment should be granted as to this claim.

12 b. Dr. Carsrud

13 In 2004, plaintiff agreed to be interviewed by Dr. Robert Carsrud, in preparation for  
14 another parole hearing before the ISRB. The result of that interview is reflected in the report  
15 issued by Dr. Carsrud on October 12, 2004, a copy of which plaintiff has attached as an exhibit  
16 to his response. (Dkt. #252, Ex. 182). Dr. Carsrud concluded the report with the following  
17 observations:

18 Mr. Clark's history demonstrates a tendency to function as a "crusader." The instant  
19 offense [plaintiff's conviction for murder] was committed ostensibly in retribution for  
20 harm caused to his girlfriend. He appears to assert himself and his rights even in  
21 circumstances that other people may see as inconsequential or in ways that may cause  
22 conflicts with other people. *This is not in and of itself necessarily a negative trait inasmuch as there are times when such an approach is effective in bringing about needed changes in a relationship or an organization.*

(Dkt. #252, Ex. 182 at 8) (emphasis added).

01 Plaintiff alleges that Dr. Carsrud “retaliated against him by having made issue of his legal  
02 activities when formulating a psychological profile of him, which created a significant chilling  
03 effect on his constitutionally protected activities.” (Dkt. #252 at 68). Plaintiff also asserts that  
04 Dr. Carsrud’s report contained “numerous references to the Plaintiff’s legal battles with the  
05 DOC.”<sup>17</sup> (*Id.*)

06 Plaintiff’s allegations are not supported, if not flatly contradicted, by the report itself. The  
07 Court has reviewed the entire report and finds no actual reference to plaintiff’s “legal battles with  
08 the DOC.” Dr. Carsrud does describe plaintiff’s personality as assertive, but as indicated above,  
09 he does not present this trait in strictly a negative light. Therefore, plaintiff has failed to satisfy  
10 his burden of showing a genuine issue of fact and defendants’ motion for summary judgment  
11 should be granted as to this claim.

#### 12 6. Classification Reports

13 Plaintiff alleges that on several occasions, defendants sabotaged his parole hearings by  
14 providing the ISRB with “classification reports” that were prepared by DOC staff and contained  
15 false and inflammatory information. (Dkt. #252 at 46, 58-59, 66-67). For example, plaintiff  
16 asserts that defendants “falsely report[ed] to the ISRB within the Plaintiff’s 6/17/04 Classification  
17 report that the Plaintiff had been found guilty of possessing pornographic drawings of his daughter  
18 as associated with the dismissed 7/02/01-728 infraction event.” (*Id.* at 46).

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21 <sup>17</sup> The Court notes that plaintiff refers to the date of the report as “10/24/04.” (Dkt. #252  
22 at 68). However, the record shows that the date of the report is actually October 12, 2004. (Dkt.  
#252, Ex. 182 at 1).

01 Although defendants do not appear to address these assertions in their motion for summary  
 02 judgment, the Court *sua sponte* finds that these claims are subject to dismissal because the  
 03 allegations, even if true, are barred from consideration in this lawsuit by the doctrine of *Heck v.*  
 04 *Humphrey*, 512 U.S. 477 (1994). Under *Heck*, a civil rights complaint under § 1983 cannot  
 05 proceed when “a judgment in favor of the plaintiff would necessarily imply the invalidity of his  
 06 conviction or sentence; if it would, the complaint must be dismissed unless the plaintiff can  
 07 demonstrate that the conviction or sentence has already been invalidated.” 512 U.S. at 487. If  
 08 plaintiff were successful in his argument that DOC submitted false classification reports to the  
 09 ISRB and the ISRB denied him parole as a result, such a result would necessarily imply that the  
 10 ISRB’s decision was invalid. Accordingly, because plaintiff has not offered any evidence that the  
 11 ISRB’s denial of parole has already been overturned, he may not proceed with the claim here and  
 12 it should be dismissed for failure to state a claim upon which relief can be granted. <sup>18</sup> See 28  
 13 U.S.C. § 1915(e)(2)(B)(ii).

#### 14 7. Transfer

15 Plaintiff asserted in his complaint that he had been transferred from one prison to another  
 16 in 2002 in retaliation for engaging in litigation against the DOC. See Complaint ¶ 119(g).  
 17 Defendants have provided exhibits that show the 2002 transfer to have been based upon several  
 18 non-retaliatory reasons, including the fact that his former prison was becoming a “close custody”

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19  
 20 <sup>18</sup> The recent Supreme Court decision in *Wilkinson v. Dotson*, 544 U.S. 74 (2005),  
 21 permitting a § 1983 plaintiff to challenge parole procedures, is distinguishable. In *Dotson*, the  
 22 Court held that the lawsuit was permissible because the prisoner’s claim did not “necessarily spell  
 speedier release” but merely would have resulted in a new hearing. *Id.* at 82. Here, by contrast,  
 plaintiff is asserting, essentially, that he would have been released had the ISRB not been  
 influenced by the false information.

01 institution and plaintiff was classified as a medium custody inmate. (Dkt. #208, Ex. 3, Attachment  
02 GG). Plaintiff's response does not seem to address this issue. Accordingly, plaintiff has failed  
03 to satisfy his burden of showing a genuine issue of fact and defendants' motion for summary  
04 judgment should be granted as to this claim.

05 8. Job Termination

06 Plaintiff asserted in his supplemental complaint that he was terminated from his job in the  
07 prison hobby shop in retaliation for having filed a grievance regarding a prior infraction. (Dkt.  
08 #112 at ¶¶ 29-31). Defendants have provided exhibits that show the termination was based upon  
09 non-retaliatory reasons related to plaintiff's job performance. (Dkt. #208, Ex. 3, Attachment OO).  
10 Plaintiff's response does not seem to address this issue. Accordingly, plaintiff has failed to satisfy  
11 his burden of showing a genuine issue of fact and defendants' motion for summary judgment  
12 should be granted as to this claim.

13 C. Miscellaneous Claims

14 Defendants contend that the following individuals should be dismissed from this lawsuit  
15 because they are either protected by immunity or are not specifically mentioned in plaintiff's  
16 complaints:

17 Dean Mason

18 Plaintiff asserts in his response that Dean Mason, who was the Grievance Program  
19 Manager in the DOC when plaintiff filed the instant lawsuit (Dkt. #208, Ex. 4), retaliated against  
20 him by failing to respond properly to plaintiff's grievance regarding the psychological report issued  
21 by Dr. Carsrud. (Dkt. #252 at 75, 68). This claim is apparently different than another claim that  
22 plaintiff has raised against Mason regarding a declaration filed by Mason in a previous lawsuit.

01 Defendants argue that Mr. Mason is shielded by witness immunity from any damages stemming  
02 from his earlier testimony (Dkt. #208 at 34, *citing Briscoe v. LaHue*, 460 U.S. 325, 330 (1983)),  
03 and that injunctive relief is not available against him because he is no longer employed by the  
04 DOC. (Dkt. #256 at 7).

05 Plaintiff's claim against defendant Mason regarding Dr. Carsrud's report lacks support as  
06 the Court has previously indicated that plaintiff's objections to the report lack substance. In  
07 addition, Mason appears to be immune from liability or injunctive relief regarding his prior  
08 testimony. Accordingly, plaintiff has failed to satisfy his burden of showing a genuine issue of fact  
09 and defendants' motion for summary judgment should be granted as to these claims.

10 L.M. Connor and Andrew Votry

11 Defendants assert that plaintiff's complaints do not mention either of the above defendants.  
12 Plaintiff responds that he has alleged retaliation by defendant Connor but plaintiff fails to mention  
13 defendant Votry. (Dkt. #252 at 75). The Court notes that Votry was dismissed from this lawsuit  
14 by Order of the Court on March 19, 2007. (Dkt. #245).

15 Plaintiff's allegations regarding Connor pertain to plaintiff's hearing on the marijuana  
16 infraction, held on December 11, 2002. Connor was apparently the hearing officer and plaintiff  
17 accuses him of not allowing plaintiff to explain how the marijuana had been planted in his cell and  
18 not verifying for himself that the substance seized was actually marijuana. (Dkt. #252 at 64).  
19 These allegations lack support in the record. Accordingly, plaintiff has failed to satisfy his burden  
20 of showing a genuine issue of fact and defendants' motion for summary judgment should be  
21 granted as to this claim.

22 ///

